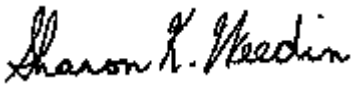
IN THE SUPREME COURT
STATE OF MISSOURI

IN RE:	)	
	)	
LAWRENCE JOSEPH HESS,	)	**Supreme Court #SC92923**
	)	
Respondent.	)	

INFORMANT'S BRIEF

OFFICE OF
CHIEF DISCIPLINARY COUNSEL



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STATEMENT OF JURISDICTION

Jurisdiction over this attorney discipline matter is established by Article V, Section 5 of the Missouri Constitution, Supreme Court Rule 5, this Court's common law and Mo. Rev. Stat. §484.040 (1994).

STATEMENT OF FACTS

The following facts are taken from the decision of the Review Board of the Illinois Attorney Registration and Disciplinary Commission in *In re Hess*, No. 2010PR00047 and the Report and Recommendation of the Hearing Board in *In re Hess*, No. 2010PR00047. Mr. Hess's petition for leave to file exceptions to the Review Board's report and recommendation was denied by the Illinois Supreme Court in an order dated September 17, 2012. App. 32-33. On the same date, the Illinois Supreme Court ordered that Respondent's license be suspended for six months, as the Review Board had recommended. App. 32-33.

Review Board Findings

In May 2001, Hess became an employee of Kanoski & Associates, a firm that represents plaintiffs in worker's compensation, medical malpractice, and personal injury matters. Hess signed an employment agreement, which provided that he would receive a base salary plus a bonus based on the amount of fees he generated. The employment agreement further provided as follows, in relevant part:

> Kanoski & Associates is a professional corporation which practices law in the State of Illinois and other states by and through its shareholder-employees and other employees who are licensed to practice law in the State of Illinois and other states.
>
> ****

Employee acknowledges that while licensed attorneys must perform all legal services, the clients contracting for said services are clients of the Corporation and not of any individual employee[.]

****

All proceeds received by [Employee] for professional services rendered for Corporation clients shall be the property of the Corporation.

****

Furthermore, Employee acknowledges that the service nature of the business of the Corporation requires close client contact, and that he has no proprietary right or interest in any client [.]

****

Employee agrees that, in the event employment is terminated, Employee will not notify, advise, solicit, or otherwise contact clients of the Corporation.

****

Corporation and Employee acknowledge that each client of the Law Firm has the right to freely choose representation in the event of a separation of employment by Employee from

> the Corporation and that choice should be allowed to take place without interference from either the Corporation or the Employee.
>
> ****
>
> Employee acknowledges that where the Corporation retains clients upon Employees [sic] termination that Employee has no proprietary interest in fees to be earned since the Employee is to be fully compensated through his salary and/or bonus for all work done while an Employee of the Corporation.

App. 9-10.

In August 2002, Ronald and Cathy Loyd entered into a contingency fee agreement with Kanoski & Associates to represent them in a medical malpractice action. Pursuant to the fee agreement, the Loyds agreed to pay "the law firm" a contingent fee. The fee agreement further stated that the law firm could assign associate counsel to work on their case and that the associate's fees would be paid by the law firm. Ronald Kanoski ("Kanoski"), the principal of Kanoski & Associates, assigned Hess to work on the Loyd case. Hess filed suit on the Loyds' behalf against Dennis Billiter, M.D., and Litchfield Family Practice Center, L.L.P., on February 10, 2004. App. 10.

Kanoski terminated Hess's employment in February 2007. According to Kanoski, Hess did not generate enough revenue to cover his overhead and his caseload had been decreasing every year. Ronald Loyd testified that he had not been satisfied with Hess's

representation. He called Kanoski to advise him of his dissatisfaction, and Kanoski told him that Hess had been discharged. Hess performed most of the work on the Loyd matter prior to his termination but did not perform any work on it after February 2007. App. 10-11.

Kanoski asked attorney Kenneth Blan to handle some of Hess's cases, and Blan became "of counsel" to Kanoski & Associates. The Loyds chose to stay with Kanoski & Associates and have Blan represent them. They signed an agreement to that effect on March 13, 2007. Blan entered an appearance as additional counsel in the Loyd matter. App. 11.

Loyd and Hess testified that they had three telephone conversations in March 2007. They gave contradictory testimony about the nature of those conversations. Loyd testified that he advised Hess that Hess was not his attorney, he wanted nothing to do with Hess, and he had retained another attorney. Loyd stated that Hess continued to say that he was Loyd's attorney after Loyd told him he had retained attorney Blan. Hess, on the other hand, testified that Loyd asked him to continue to represent him but Hess declined due to his unemployment, lack of funds to pay the costs associated with the case, and lack of malpractice insurance. Hess and Loyd did not speak with each other again after March 2007. App. 11.

A mediation in the Loyds' case took place in March 2008. The parties finalized their settlement agreement in June 2008, after Loyd's worker's compensation contract was approved. App. 11.

Hess consulted with Carr in April 2008 about his belief that Kanoski & Associates owed him compensation for cases he had handled. Carr agreed to represent Hess on a contingent basis. Carr testified that he reasonably believed that Hess was still the Loyds' attorney. Carr performed about 30 hours of research on the law and facts, which included reviewing Hess's employment contract and employment manual. Carr believed that an attorney-client relationship between the Loyds and Hess still existed because (1) Hess's appearance for the Loyds had not been withdrawn or stricken; (2) Hess was still listed as the Loyds' attorney of record in the court file; (3) Blan filed his appearance on behalf of the Loyds as "additional counsel"; and (4) the Loyds had not notified Hess that he was discharged as their attorney. App. 11-12.

On May 15, 2008, Carr sent a letter to the Loyds, which stated in relevant part:

> Recently, Mr. Hess has retained me as his attorney. Please be advised that Mr. Hess remains responsible for the lawsuit you entrusted to him. If you have any questions, do not hesitate to call Mr. Hess. App. 12.

Carr knew at the time he sent the letter that Hess had done no work on the Loyd case since February 2007 and that as of January 2008 Hess did not have an active Illinois law license. Carr did not believe that these facts precluded Hess's attorney-client relationship with the Loyds. App. 12.

Carr sent notices of attorney's lien to the Loyd defendants on May 15, 2008, and to the Circuit Court of Montgomery County on May 21, 2008. On May 16, 2008, Loyd

sent a response to Carr in which he stated that Hess "IS NOT responsible for my lawsuit" (emphasis in original) and instructed Carr not to contact him. App. 12.

The Loyds were to receive their settlement funds by mid-July 2008. The disbursement was delayed by the proceedings to adjudicate Hess's lien. Blan testified that, although Carr stated in court that he would agree to place the disputed attorney fees in escrow and disburse the remaining settlement proceeds to the Loyds, Carr later refused to do so. This prompted Blan to hire attorney George Riplinger to handle the lien adjudication. Carr denies that he was unwilling to allow the Loyds to receive their funds and attributed the delay to Blan and Kanoski. The Loyds received their settlement funds in October 2008, which Blan testified was a three or four month delay. App. 12.

Carr filed notice of attorney's liens in additional matters that Hess handled while at Kanoski & Associates. Two of those matters are the subject of charges of misconduct: Eller v. Villegas, No. 05L24, filed in the Circuit Court of Macoupin County; and Thompson v. Skeffington, No. 02L51, filed in Macon County. App. 13.

The circuit courts of Montgomery, Macoupin, and Macon Counties struck the notices of attorney's liens in the Loyd, Eller and Thompson cases. Respondents appealed the judgments in Loyd and Thompson, and the Appellate Court affirmed the circuit courts' judgments. During oral argument in the Thompson case, one of the Appellate Justices characterized Carr's assertion that Hess's attorney-client relationship with Thompson continued despite his termination from Kanoski & Associates as "the most absurd, ridiculous argument I think I've heard in 21 years on this court." App. 13.

On July 17, 2008, on Hess's behalf, Carr filed a lawsuit in the Circuit Court of Montgomery County against the Loyds. Carr testified that the lawsuit was a response to the Loyds' participation in Kanoski's efforts to defeat Hess's notice of attorney's lien. Carr testified that the Loyds falsely attested that they told Hess in March 2007 that they "wanted nothing further to do with him." The complaint sought recovery from the Loyds for breach of contract, breach of promise, interference with Hess's liens, and unjust enrichment. App. 13.

Carr testified that the action was meritorious, and he believed the Loyds owed Hess money. Hess testified that he had three conversations with Carr about filing suit against the Loyds, which included discussing the facts and the theories of liability. On two occasions, Hess declined to file the lawsuit. After the Loyds signed the attestation related to the notice of attorney's lien, Carr asked Hess again about suing the Loyds. Hess then gave Carr permission to file the lawsuit. Hess did not review the complaint before Carr filed it but later read it. App. 13-14.

Kanoski testified that he felt "stunned" and "embarrassed" when he learned of the complaint against the Loyds. He told the Loyds that his firm would defend them at no charge. Attorney Todd Bresney, an associate at Kanoski & Associates, handled the Loyds' defense. App. 14.

On September 23, 2008, Carr sent Bresney a demand letter stating that Hess's claims against the Loyds could be settled if Kanoski and Blan agreed to pay Hess a portion of the Loyds' settlement funds. Carr sent a similar letter on October 2, 2008,

demanding $165,312, which constituted half of the attorney fees that were placed in escrow. Bresney found Carr's demand appalling and "nothing but extortion." App. 14.

On December 5, 2008, the circuit court dismissed Hess's complaint against the Loyds with prejudice. The court ruled that Hess did not have a contract with the Loyds and imposed sanctions in the amount of $9873.83. The Illinois Appellate Court, Fifth District, affirmed the circuit court's judgment. Loyd v. Billiter, No. 5-09-0065 (Oct. 5, 2010) (unpublished order under Supreme Court Rule 23). App. 14.

Hearing Board Findings

In August 2002, Ronald Loyd entered into a contingent fee contract, hiring Kanoski & Associates to represent him in a medical malpractice action. It is clear from the evidence, including Ronald Loyd's testimony, that Loyd hired the Kanoski & Associates law firm and did not hire any individual employee or associate thereof. Ron Kanoski then assigned Hess to handle the matter for Ronald and Cathy Loyd. Hess handled most, if not all, of the legal work on behalf of the Loyds. Hess filed a complaint on their behalf in February 2004 in the case entitled Ronald and Cathy Loyd v. Dennis Billiter, M.D.. *et. al.*, Montgomery County, No. 04-L- I 0. The first sentence of the complaint stated that "now comes the Plaintiff, Ronald 0. Loyd, by and through his attorneys Kanoski & Associates." Hess continued to work on the Loyds' case until he was discharged from his employment at Kanoski & Associates on February 14, 2007. Hess did not do any work on behalf of the Loyds after he was discharged from Kanoski & Associates. App. 138-139.

On March 12, 2007, attorney Kenneth Blan entered his appearance as additional counsel in the Loyds' medical malpractice case. On March 13, 2007, Ronald Loyd entered into and signed a contingent fee agreement with the Blan Law Offices, in regard to that case. App. 139.

After being discharged from Kanoski & Associates, Hess had three telephone conversations with Ronald Loyd in March 2007. What was said during those conversations is in sharp dispute. Ronald testified he told Hess that Hess "wasn't my attorney and that I didn't want nothing to do with the guy" that Ronald "was not interested for [Hess] being my attorney;" and that "I had already got an attorney and signed with Ken [Blan] and Ron [Kanoski]." Ronald also denied that he asked Hess to take over his case again. Hess, on the other hand, testified that, during those telephone conversations, Ronald said he and wife had been looking for Hess, and then asked Hess to "take my cases again." Hess also testified that Ronald did not fire Hess or say that he did not want Hess as his attorney. Hess did not speak with Ronald after March 2007. App. 139.

From January 2008 to October 2008, Hess was not authorized to practice law in Illinois. He chose not to pay the Illinois attorney registration fee for the year 2008 because he was attempting to reduce his expenses and planned to practice law only in Missouri. He later changed his mind and his law license in Illinois was reinstated in October 2008. App. 139.

Hess believed he had a breach of contract action against Kanoski & Associates, and was owed compensation, based upon his discharge from that firm. In April 2008, Hess hired Carr to represent him. App. 139.

On May 15, 2008, Carr sent a letter to Ronald and Cathy Loyd, informing them that Hess had retained Carr as his attorney and stating that "Hess remains responsible for the lawsuit you entrusted to him." Also on May 15, 2008, Carr sent notice of Hess' attorney's lien to Dr. Billiter, the defendant in the Loyds' medical malpractice lawsuit. A copy of the Notice of Lien was sent to Ron Kanoski. App. 140.

Ronald Loyd responded to Carr on May 16, 2008. In his letter to Carr, Ronald said "Mr. Hess is not responsible for my lawsuit. I have a very competent attorney. Do not contact me again regarding this matter." Hess said that he received Loyd's letter on Monday, May 19, 2008, and that, even though the letter did not say Hess was fired, Hess and Carr treated this letter as Loyd's attempt to terminate his relationship with Hess. App. 140.

On May 21, 2008, Carr filed Hess' Notice of Attorney's Lien with the Clerk of the Circuit Court of Montgomery County in the case captioned Ronald and Cathy Loyd v. Dennis Billiter, M.D. *et, al.,* No. 04-L-10. A copy thereof was sent to the Loyds. The Loyds, through their attorneys, the Blan Law Office and Kanoski & Associates, filed a Petition to Strike or Adjudicate Lien on June 24, 2008. The Petition asserted, among other things, that Ronald Loyd told Hess during their

telephone conversations in March 2007 that Ronald "wanted nothing further to do with" Hess, and that the Loyds "had competent representation with whom they were very pleased." Both Ronald and Cathy Loyd signed an attestation certifying that the statements in the Petition were true. App. 140.

Hess testified that he gave Carr permission to file a lawsuit against the Loyds "after the Loyds signed the attestation which was inaccurate claiming that they had in essence fired me in February or March 2007." Carr also testified that the lawsuit against the Loyds was "in response to their lies that they had discharged Mr. Hess knowing that they had not discharged Mr. Hess at that time, I knew that they were helping Mr. Kanoski in their attempt to defeat Mr. Hess' lawsuit against Mr. Kanoski & Associates. They became conspirators with Mr. Blan and Mr. Kanoski." While Hess discussed with Carr the claims against the Loyds, he said he did not read the complaint until after it was filed. App. 140-141.

Hess' complaint against the Loyds, described above, was filed in the Circuit Court in Montgomery County on July 17, 2008. On September 23, 2008, Carr sent a letter to the Loyds' attorney, Todd Bresney, stating "we could probably settle Mr. Hess' claim against the Loyds in exchange for Kanoski & Blan's payment to Mr. Hess of Mr. Hess' portion of the Loyd fee." Carr sent a second letter to Bresney on October 2, 2008, stating that the defendants in the Loyds' medical malpractice case "deposited $330,625 in escrow for attorney's fees and costs ... with the Montgomery County Clerk" and "I will recommend that Mr. Hess dismiss his claim against the Loyds in exchange for half of the money now on deposit-$165,312." App. 141.

The Circuit Court dismissed with prejudice Hess' complaint against the Loyds. The court found that Hess' claims were "legally deficient," and that Hess "does not have a valid legal basis for his claims against these defendants." The court also found that the Loyds were entitled to sanctions. Ultimately, the court awarded the Loyds "$9,275 in attorney fees and $114.82 in expenses from plaintiff [Hess] or his attorney, Bruce Carr." App. 141.

Based upon the evidence, including our findings regarding credibility, it was clearly and convincingly established that the Respondents filed the lawsuit against Ronald and Cathy Loyd while knowing it was frivolous and without any legal merit, and for the purpose of harassing and burdening the Loyds because of an employment dispute with Kanoski. The complaint asserted that the Loyds breached their contract with Hess and their promises to Hess regarding compensation for Hess' legal services to them. It is clear, however, that the Loyds did not enter into any contract or agreement, or make any promise, to pay any attorney's fee to Hess. Rather, the Loyds entered into a contingent fee contract with Kanoski & Associates, and thereby agreed to pay a contingent fee to Kanoski & Associates. The contract makes no mention of the Loyds paying any amount to Hess or anyone else. The Loyds, or any reasonable person in the circumstances, would not have understood or expected that they could be held responsible for paying any compensation to any employee of Kanoski & Associates who may have worked on their case. The Loyds did not at any time fail to comply with the

terms of their contract with Kanoski & Associates. Hess was an employee of and had an employment agreement with Kanoski & Associates. Under the plain terms of that employment agreement, Hess was to be paid by Kanoski & Associates, not by clients who entered into representation agreements with Kanoski & Associates. App. 141-142.

Hess' complaint against the Loyds also asserted that the Loyds received an unjust enrichment from Hess' legal services because they "refused to pay Lawrence J. Hess just and reasonable compensation for his services." It is clear that "an attorney who enters into a contingent-fee contract with a client and is discharged without just cause is entitled to be paid on a *quantum meruit* basis a reasonable fee for the services rendered up to the date of the discharge." Alleman v. Fannell, 362 Ill. App. 3d 944, 947, 841 N.E. 2d 1034, 1036 (2005). However, Hess did not enter into a contingent fee agreement, or any other fee agreement, with the Loyds. As discussed above, the Loyds had an agreement to pay attorney's fees only to Kanoski & Associates, and Hess had agreed to be paid only by Kanoski & Associates for the legal services he provided as an employee thereof. In other words, if Hess was not reasonably compensated for the work he performed on the Loyds' medical malpractice case, his contractual dispute was with Kanoski & Associates, not with the Loyds. There are no credible facts which justify a finding that there was a contract or agreement between Hess and the Loyds. App. 142-143.

Hess' complaint against the Loyds also asserted that the Loyds tortiously interfered with Hess' attorney's lien. As discussed in Count II, below, Hess did not serve notice of his attorney's lien timely, that is, while he had an attorney-client relationship with the Loyds. As a result, Hess' attorney's lien was not perfected, and the alleged tortious conduct of the Loyds, which occurred long after the time for perfecting Hess' attorney's lien had expired, had no affect on Hess' attorney's lien. App. 143.

Additionally, the basis for the tortious interference allegation was that the Loyds falsely attested in June 2008 that Ronald Loyd had discharged Hess in March 2007. However, according to Hess' own testimony he knew that he did not represent the Loyds after March 2007. Hess testified that he had three telephone conversations with Ronald Loyd in March 2007. During those telephone conversations, according to Hess' testimony, Ronald asked Hess to "take my cases again." Hess further testified that, in reply to Loyd, Hess said "I would love to, but I have been unemployed and I don't have any money to front the costs of experts and, expenses and depos and so forth;" "Ron, I don't have any place to take you. I can do it;" The Supreme Court has made it clear that an attorney-client relationship "is voluntary and requires the consent of the attorney and the client" and "[b]ecause this relationship is consensual, the client must authorize the attorney to act on his behalf, and the attorney must accept this power." People v. Graham, 206 Ill. 2d 465, 473, 795 N.E. 2d 231, 237 (2003). See also People v. Simms, 192 Ill. 2d 348, 382, 736 N.E.2d 1092, 1117 (2000). Hess' own

testimony showed that he declined to represent the Loyds in March 2007, and that there was no authorization by the client and acceptance by Hess in the Loyd matter. Thus, Hess knew he did not represent or have an attorney-client relationship with the Loyds after his telephone conversations with Ronald Loyd in March 2007. Consequently, the conduct or statements of the Loyds in June 2008, whatever they were, had no affect on and could not have interfered with Hess' purported attorney's lien. App. 143-144.

We also find that, based upon the totality of the circumstances shown by the evidence, the Respondents' purpose for filing the lawsuit against the Loyds was to harass, intimidate and burden the Loyds in order to pressure or influence Kanoski and Blan to settle Hess' claim against them. This was made clear by the letters Carr sent to the Loyds' attorney in September and October 2008. In both letters, Carr indicated that the Hess lawsuit against the Loyds would be dismissed if Ron Kanoski and Kenneth Blan paid Hess a portion of the fee obtained in the Loyds' medical malpractice case. Neither Kanoski nor Blan was a party to Hess' lawsuit against the Loyds. The Respondents were aware, as shown by the above letters, that Kanoski and Blan would be concerned about the adverse effects Hess' baseless lawsuit would have on the Loyds, and may be inclined to settle the separate contract dispute in order to protect the Loyds from further distress. App. 144.

We further find that both Respondent Carr and Respondent Hess knowingly and deliberately participated in the filing of the meritless lawsuit against the Loyds. App. 144.

. . . .

The evidence clearly and convincingly established that the Respondents served notices of an attorney's liens in the cases of the Loyds, Eller, and Thompson even though they knew there was no legal basis for doing so, and for the purpose of harassing, intimidating, and burdening those individuals. As in Count I, the Respondents sought to use the liens to pressure or influence Ron Kanoski and Kenneith Blan to settle Hess' claims against them in a separate dispute. App. 150.

It is well established that notice of a statutory attorney's lien must, in order to be perfected, be served while there is still an attorney-client relationship. See Rhodes v. Norfold & Western, 78 Ill. 2d 217, 227, N.E. 2d 969, 973-74 (1979). The Loyds, Penny Eller, who was the special administrator of the Estate of Terry Eller, and Robert Thompson entered into contingent fee agreements with Kanoski & Associates to represent the. Kanoski & Associates then assigned Hess, an employee of Kanoski & Associates, to handle those cases. Hess worked on those cases until he was discharged by Kanoski & Associates on February 14, 2007. Hess' attorney-client relationship with the Loyds, Eller, and Thompson was clearly on behalf of and through his employment contract with Kanoski & Associates. None of the clients entered into a representation agreement with Hess, and none of them agreed to pay any compensation to Hess. Clearly, Hess was to receive compensation only from Kanoski & Associates as set forth in the employment agreement, discussed in Count I, and not from those who entered into contingent fee agreements with Kanoski & Associates. Thus, when Hess was discharged

by Kanoski & Associates on February 14, 2007, his attorney-client relationship with the Loyds, Eller, and Thompson ended. As a result, the service of the notices of Hess' attorney's liens in May 2008 was long after the attorney-client relationship had ended. Thus, the liens were not properly perfected and were invalid. App. 150-151.

Another condition for an effective attorney's lien is that "the attorney must have been hired by the client to assert a claim." Rhodes, 78 Ill. 2d at 227. As stated above, it is clear to us that the Loyds, Eller, and Thompson hired and agreed to pay Kanoski & Associates to assert their claims, and did not hire Hess or agree to pay any compensation to Hess. Thus, Hess had no valid attorney's lien in the above cases. App. 151.

The Respondents cite the principle that a client who hires a law firm also hires all the members of the law firm. While this is a valid principle, it has no application in this matter. In Corti v. Fleisher, 93 Ill. App. 3d 517,521, 417 N.E. 2d 764, 768 (1981), the Appellate Court explained:

> It is fundamental that the employment of one member of a law firm is the employment of all whether specifically consulted or not, except where there is a special understanding to the contrary. This principle, however, typically finds its application in situations concerning the authority of a member of a law firm to represent a client or to contract with the client on the firm's behalf. Plaintiff cites no cases where the concept has been extended to circumstances such as these, where an employee of a firm, instead of

> asserting his authority to act for the clients as a representative of the firm, attempts to create an attorney-client relationship between the clients and him alone, and to depart from the firm with the clients' files without their consent to the newly created relationship. We believe no such authority exists.

App. 151.

We also note the decision in Crabb v. Anderson, 117 Ill. App. 2d 271, 254 N.E. 2d 551 (1969). Crabb employed the law firm of Ozman & Blowitz to represent him in a personal injury claim against Anderson. When the law firm dissolved, Crabb's file remained with Blowitz. An attorney named Heilgeist had an agreement with Blowitz, whereby Heilgeist was to be paid $200 per week and one-third of the fee in any case he tried. Heilgeist tried Crabb's case, which resulted in a verdict of $50,000 for Crabb. Heilgeist served an attorney's lien against the recovery of Crabb, which money was on deposit with the circuit clerk. The issue before the Appellate Court was "whether Heilgeist has a statutory lien on the funds presently in the hands of the Circuit Court." The Appellate Court held that Heilgeist did not have a valid attorney's lien. In reaching its decision, the Appellate Court stated:

> We hold that the evidence fails to show that Crabb placed any claim or cause of action in the hands of Heilgeist, and absent this element, essential to the creation of a valid statutory lien, no lien can be awarded.

> We next consider Heilgeist's contention that the facts show an attorney-client relationship with Blowitz. The record does not support the contention, but assuming, arguendo, the relationship exists, the lien fails for the reason that the notice purporting to crate the lien apparently asserts a lien against the recovery of Crabb, not that of Blowitz.

Calder, 117 Ill. App. 2d at 276-77. App. 151-152.

In the case before us, it is clear that the Loyds, Eller and Thompson hired and placed their claims in the hands of Kanoski & Associates, not Hess, and that Hess' involvement in their cases was as an employee and representative of Kanoski & Associates. Thus, Hess had no statutory attorney's lien and no reason to believe he had. App. 152.

The Loyds, Eller, and Thompson could have hired Hess to represent them after Hess was discharged by Kanoski & Associates. However, there is no evidence that they did so. Likewise, there is no evidence that Hess represented them or agreed to represent them after he was discharged by Kanoski & Associates. The evidence showed that Hess did not do any work on any of their cases after February 2007. Also, as mentioned in Count I, Hess' testimony regarding his telephone conversations with Ronald Loyd in March 2007 showed that he declined to represent the Loyds. Hess testified that Ronald asked Hess to "take my case again" but that Hess replied: "I can't take your case." Hess also testified that he explained to Ronald that "I have been unemployed and I don't have any money to front the costs of experts and expenses and depos and so forth. And I don't

have any insurance." Thus, Hess' own testimony showed that after February 2007 he was not in a position and did not want to represent the Loyds. As noted in Count I, to have an attorney-client relationship the client must have authorized the attorney to act on his or her behalf and the attorney must have accepted this power. See Graham, 206 Ill. 2d at 473; Simms, 192 Ill. 2d at 382. App. 152-153.

In addition to the above, Hess chose not to pay his Illinois attorney registration fee for the year 2008, and he was not authorized to practice law in Illinois from January 2008 to October 2008. He explained that he did not pay the registration fee because he was trying to cut expenses, and thought he had a better chance of finding employment in Missouri, where he was still licensed. By choosing not to pay the Illinois attorney registration fee, Hess clearly demonstrated that he did not want and did not have any clients in Illinois. Consequently, Hess made a conscious decision not to represent the Loyds, Eller, Thompson or anyone else in Illinois during 2008. App. 153.

Accordingly, we further find that both Carr and Hess actively participated in the serving of the notices of a attorney's lien and filing the notices with the Circuit Courts while knowing that the attorney's liens were without merit and invalid. App. 153.

Respondent Hess was admitted to Missouri's bar in 1975. He has no Missouri disciplinary history.

POINT RELIED ON

THE SUPREME COURT SHOULD DISCIPLINE RESPONDENT BECAUSE THE ILLINOIS SUPREME COURT DISCIPLINED HIS LICENSE FOR VIOLATION OF RULES ANALOGOUS TO MISSOURI RULES 4-3.1 (MERITORIOUS CLAIMS AND CONTENTIONS) AND 4-8.4 (d) (ENGAGE IN CONDUCT PREJUDICAL TO THE ADMINISTRATION OF JUSTICE) IN THAT HE KNOWINGLY AND DELIBERATELY PARTICIPATED IN BRINGING MERITLESS AND FRIVOLOUS CASES AND LIENS THEREBY WASTING THE TIME AND RESOURCES OF THE COURTS, THE PARTIES, AND HIS FORMER CLIENTS AND HARMING THE INTEGRITY OF THE PROFESSION.

In re Hess, M.R. 25481 (IL Sup. Ct. Sept. 17, 2012).

In re Stewart, 342 S.W. 3d 307 (Mo. banc 2011).

In re Caranchini, 956 S.W. 2d 910 (Mo. banc 1997), cert den. 524 U.S. 940.

ARGUMENT

THE SUPREME COURT SHOULD DISCIPLINE RESPONDENT BECAUSE THE ILLINOIS SUPREME COURT DISCIPLINED HIS LICENSE FOR VIOLATION OF RULES ANALOGOUS TO MISSOURI RULES 4-3.1 (MERITORIOUS CLAIMS AND CONTENTIONS) AND 4-8.4 (d) (ENGAGE IN CONDUCT PREJUDICAL TO THE ADMINISTRATION OF JUSTICE) IN THAT HE KNOWINGLY AND DELIBERATELY PARTICIPATED IN BRINGING MERITLESS AND FRIVOLOUS CASES AND LIENS THEREBY WASTING THE TIME AND RESOURCES OF THE COURTS, THE PARTIES, AND HIS FORMER CLIENTS AND HARMING THE INTEGRITY OF THE PROFESSION.

Introduction

On October 30, 2012, disciplinary counsel filed an information pursuant to Rule 5.20 informing the Court that the Illinois Supreme had disciplined Respondent Hess's Illinois law license for professional misconduct. The Illinois Supreme Court suspended Respondent from practicing law for six months. *In re Hess*, M.R. 25481 (IL Sup. Ct. Sept. 17, 2012).

In accordance with the procedure set forth in Rule 5.20, the Court issued Respondent an order to show cause why his Missouri license should not be disciplined based on the September 17, 2012, order of the Illinois Supreme Court.

On November 28, 2012, Respondent filed a response to the order to show cause. Hess asserts two grounds against imposition of reciprocal discipline. First, Hess contends that the Illinois Supreme Court should not have concluded he committed professional misconduct because he was the client in the Illinois litigation found to have been brought in violation of Illinois Rules 3.1 and 8.4 (a) (5). He argues that Missouri should not, therefore, discipline him for violation of those rules.[1]

Second, Hess contends that the complaint filed in the Illinois discipline case denied him due process because it did not allege all the facts that formed the basis for the Illinois misconduct.

This Court, on January 23, 2013, ordered a briefing schedule activated.

It is noted at the outset that Hess, in his response to the show cause order, took no issue with the level of sanction imposed by the Illinois Supreme Court. Rather, Respondent takes the position that no discipline is appropriate. It is, nonetheless, noted that the words "knowing" and "deliberate," used by the review board to describe Respondent's mental state, as well as the finding that Hess "misused the courts and harmed Hess's former clients in an effort to gain an advantage in Hess's employment dispute" more than substantiate an actual suspension. App. 21, 25.

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[1] Respondent's statement that the Illinois disciplinary rules "are not intended to interfere with a client's (Mr. Hess) constitutional right of free and full access to the courts of the state of Illinois," App.40, is a variation on his "clients cannot be disciplined" argument and as such is not accorded separate treatment herein.

Respondent Hess suggests that the Illinois Supreme Court's order is suspect, or that the review board's decision, underlying the Illinois order, is somehow deserving of little weight, because the Illinois Supreme Court did not "approve and confirm" the review board's decision. It is undersigned counsel's understanding that the Illinois Supreme Court's disciplinary orders "approve and confirm" a review board decision only when the Court has granted a party's petition for leave to file exceptions to the review board's decision. Here, the Illinois Court denied Respondent Hess' petition for leave to file exceptions. In that posture, the Illinois Supreme Court ordered discipline "as recommended by the Review Board," rather than approving and confirming the review board's decision. If anything, the procedural posture of the Illinois discipline case reinforces the strength of the discipline case against Respondent - - the Illinois Supreme Court found Respondent's objections to the review board's decision unpersuasive, denied his petition to file exceptions to it, and ordered the discipline recommended by the board.

Hess can be sanctioned for violation of Rules

4-3.1 and 4-8.4 (d) even though he was

the client in the frivolous litigation

Rule 4-3.1 states that "A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous." The rule does not limit its applicability to lawyers acting in a representational capacity, as do several other rules of professional conduct. For example, Rules 4-3.9 , 4-4.1, 4-4.2, 4-4.3, and 4-4.4 all contain the phrase "a lawyer representing a

client" or "on behalf of a client," thereby limiting those rules' applicability to attorneys advocating in a representational capacity. The absence of such a limiting clause in Rule 4-3.1 dispels Respondent's contention that he is not accountable for violating it.

Rule 4-3.1's antecedent model code rule, DR 7-102, contained the introductory phrase "In his representation of a client, a lawyer shall not . . . ." By not carrying over that language to Rule 4-3.1, this Court manifested its intention that the Rule's proscription against bringing frivolous litigation should apply to any lawyers bringing such litigation.

There is no good policy reason for exempting Respondent from the Rule's reach in this case. It was determined in the Illinois disciplinary case that Hess knowingly and deliberately participated, with Carr (his attorney), in the bringing of the litigation. "The evidence showed that Hess consulted with Carr about the lawsuit, twice declined to file it, then gave his approval after the Loyds assisted Kanoski in attempting to defeat Hess's notice of attorney's lien. Hess was not merely an innocent bystander who relied on Carr." App. 21. A lawyer may not ethically file frivolous litigation, i.e., litigation lacking a basis in law and fact. The rule literally and logically applies to a lawyer/client actively involved in the bringing of the litigation by another lawyer on his behalf.

By bringing multiple claims and liens lacking a basis in law and fact, Respondent also violated Rule 4-8.4 (d) (lawyer shall not engage in conduct prejudicial to the administration of justice). Rule 4-8.4, like 4-3.1, is not limited to conduct committed in the course of a representation. Frivolous litigation wastes judicial resources and has a deleterious effect on parties to the litigation. It reinforces public perception that attorneys

promote frivolous litigation. Here, Respondent brought attorney lien cases in three different Illinois circuit courts, all of which stemmed from work Respondent did while an employee at Kanoski & Associates, where his compensation was contractually limited to salary and bonus. All the notices of attorney's lien were struck. Respondent appealed two of those decisions; Respondent lost both of the appeals. Respondent also sued his former clients, the Loyds, in July of 2008. Respondent demanded half the attorney fees paid in the Loyds' case to settle his claim against the Loyds. The case was dismissed with prejudice, and the circuit court imposed sanctions against Respondent. The trial court's action was affirmed on appeal. Hess's pattern of bringing specious litigation in an effort to obtain fees to which he clearly was not entitled was conduct prejudicial to the administration of justice in violation of Rule 4-8.4 (d). *Cf. In re Caranchini*, 956 S.W. 2d 910 (Mo. banc 1997), cert den. 524 U.S. 940 (lawyer violated Rule 4-8.4 (d) by violating numerous rules, including Rule 4-3.1, by pursuing a client's case after it had become apparent the claim was not well-founded in fact).

A significant portion of Mr. Hess's response to the show cause order rests on his misguided notion that the Rules of Professional Conduct only regulate conduct performed by a lawyer in the course of representing a client. That contention stands in opposition to decades of this Court's decisional law. While many of the rules, as would be expected, revolve around duties performed and owed by lawyers to clients in the course of a representation, the rules also address a lawyer's ethical responsibility to conform his business and personal affairs to the requirements of the law. *See In re Stewart*, 342 S.W.

3d 307 (Mo. banc 2011), *In re Duncan*, 844 S.W. 2d 443 (Mo. banc 1992), *In re Frick*, 694 S.W. 473 (Mo. banc 1985), *In re Panek*, 585 S.W. 2d 477 (Mo. banc 1979). The Court disciplines attorneys for two purposes: protection of the public and maintenance of the profession's integrity. Here, the Illinois record substantiates that Respondent knowingly and deliberately participated in bringing frivolous litigation. There was evidence that Respondent's former clients were emotionally and financially harmed by Respondent's conduct. The integrity of the profession takes a hit when a lawyer, whether as a client or an attorney acting in a representational capacity, brings frivolous litigation for what appears to have been the purpose of coercing money from a former employer.

The Preamble to the Rules of Professional Conduct states: "A lawyer should use the law's procedures only for legitimate purposes and not to harass or intimidate others." Preamble: A Lawyer's Responsibilities, ¶ 5. The Preamble, like Rules 4-3.1 and 4-8.4 (d), does not limit its applicability to lawyers acting in a representational capacity. Attorneys commit professional misconduct when they bring frivolous litigation whether they are doing it for a client or themselves. Rules 4-3.1 and 4-8.4 (d) address duties for which Mr. Hess, and not just his attorney, can be held to account.

Respondent's reliance on a 1994 decision of the Illinois Review Board[2] (*Greenblatt*) is not persuasive. Notably, Respondent Hess cited *In re Greenblatt*, 92 CH

[2] Illinois attorney discipline cases are tried before a hearing board. The hearing board's decisions are subject to review by the review board. The review board makes a recommendation to the Illinois Supreme Court, which orders discipline.

269, No. M.R. 10357 (1994) to the Illinois Supreme Court in his petition asking the Illinois Court to review the review board's decision in this case. The Illinois Supreme Court denied his petition to file exceptions, notwithstanding Respondent's argument based on *Greenblatt.* If the Illinois Supreme Court was not persuaded by the review board's 1994 *Greenblatt* decision, then the case should have little persuasive authority here.

The Illinois and Missouri rules proscribe the bringing of a proceeding unless there is a nonfrivolous basis for doing so. No authority was discovered that would support Respondent's claim that he is immune from the rule's reach because he was a party, not the attorney, asserting the frivolous issue. Respondent does not argue that Mr. Carr, his attorney of record in the frivolous litigation, acted without consulting Respondent and obtaining his consent. This was not a case of a rogue lawyer filing frivolous lawsuits without Mr. Hess's knowledge and consent. To the contrary, there was substantial evidence that Hess knowingly and actively participated in the objectionable conduct.

> The Hearing Board found that Hess's lawsuit against the Loyds was meritless and that Hess knowingly and deliberately participated in its filing. Hess has not presented any reason for us to disturb these findings. The evidence showed that Hess consulted with Carr about the lawsuit, twice

> declined to file it, then gave his approval to file after the Loyds assisted Kanoski in attempting to defeat Hess's notice of attorney's lien. Hess was not merely an innocent bystander who relied entirely on Carr. Rather, he actively participated in the decision to file suit against the Loyds. Under these circumstances, we cannot say that the finding that Hess violated Rule 3.1 was contrary to the manifest weight of the evidence.

App. 21.

The Illinois Supreme Court's disciplinary order did not deny Hess's right to due process

On December 13, 2012, Respondent Hess filed a petition for writ of certiorari to the United States Supreme Court seeking review of the Illinois disciplinary decision. *Hess v. Illinois Attorney Registration and Disciplinary Commission*, No. 12-750. On February 19, 2013, the Supreme Court denied Hess's petition.

Respondent's due process argument is difficult to discern. He appears to assert that the Illinois disciplinary complaint failed to allege sufficient facts against him to support the discipline imposed by the Illinois Supreme Court. Yet, Respondent has not favored the Missouri Supreme Court with a copy of the Illinois complaint he claims is constitutionally deficient. This Court ordered Respondent to show cause why he should not be disciplined based on the Illinois Supreme Court's order. Surely, if he was going to raise a due process argument based on another state's pleading, he should have, at a

minimum, have attached a copy of the pleading. *Cf. United C.O.D. v. State*, 150 S.W. 3d 311 (Mo. banc 2004).

Respondent's due process argument was considered and rejected by the Illinois review board. The Illinois Supreme Court declined to allow Respondent to file exceptions to the review board's decision. The United States Supreme Court denied Respondent's petition for certiorari from the Illinois Supreme Court's disciplinary order. Respondent's due process argument has been fully vetted and found lacking. Nevertheless, the Illinois review board's analysis of the due process claim, for the Court's consideration, follows.

> In a disciplinary proceeding, due process requires that a respondent receive notice of the allegations against him and a fair opportunity to defend against those allegations. In re Chandler, 161 Ill.2d 459, 470 641 N.E. 2d 473 (1994). We have compared the allegations of the complaint to the Hearing Board's findings and do not discern any violation of Respondents' due process rights. Respondents' arguments are technical in nature and do not establish that they were disciplined for uncharged misconduct.
>
> For example, Respondents contend that the Administrator's complaint did not inform them that Hess's entire cause of action against the Loyds was frivolous because

> the Administrator alleged that only a few paragraphs of Hess's complaint lacked a legal and factual basis. Although the Administrator's complaint specifies certain allegations from the Hess v. Loyd complaint as lacking a legal and factual basis, the Administrator also alleged that the circuit court dismissed the Hess v. Loyd complaint on the grounds that all of Hess's claims were legally deficient and the complaint was brought to harass the Loyds and attempt to gain an advantage over other parties. These allegations provided notice to Respondents that they were charged with filing a lawsuit that was frivolous in its entirety and used for improper purposes. While the Hearing Board's findings do not precisely mirror the Administrator's complaint in every instance, Respondents have not shown that they were surprised by the evidence presented at the hearing or unable to defend themselves against the charges. Accordingly, their due process rights were not violated.

App. 17-18. Respondent failed to take minimally appropriate steps to preserve his Constitutional argument in this proceeding. Even if he had, the argument has been considered and rejected in the Illinois disciplinary proceeding. It was not an argument the United States Supreme Court voted to address.

Should the Missouri Supreme Court deem review of the Illinois disciplinary complaint appropriate, a copy of it was obtained from Illinois disciplinary authorities and has been included in the Appendix. App. 95-113. The factual allegations naming Hess and reciting his consultation with and affirmation of his attorney's conduct are many and specific. Respondent Hess has suffered no deprivation of due process.

CONCLUSION

In accordance with the two purposes of attorney discipline, the focus in this attorney disciplinary proceeding must be on the people and the integrity of the legal profession that Rule 4-3.1 and Rule 4-8.4 (d) are designed to protect - - Respondent's former clients, opposing counsel, the court system, and the integrity of a profession harmed by Hess's frivolous and injurious conduct. Hess is not immune from the consequences of his actions by virtue of the fact that another attorney served as his attorney of record in bringing the litigation. The Illinois record makes clear that Respondent was a knowing and active participant in the misconduct. The Court should suspend Respondent's Missouri license without leave to apply for reinstatement for six months.

Respectfully submitted,

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ATTORNEY FOR INFORMANT

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of March, 2013, the Informant's Brief was sent through the Missouri Supreme Court e-filing system to:

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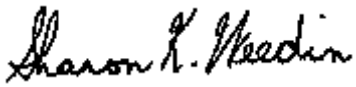
St. Louis, MO 63130-4003



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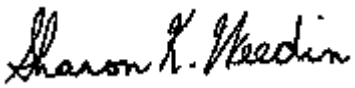
Sharon K. Weedin

CERTIFICATION: RULE 84.06(c)

I certify to the best of my knowledge, information and belief, that this brief:

1. Includes the information required by Rule 55.03;
2. Complies with the limitations contained in Rule 84.06(b);
3. Contains 8,179 words, according to Microsoft Word, which is the word processing system used to prepare this brief.



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Sharon K. Weedin

APPENDIX

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